Calendar No. 1958

82D CONGRESS
2d Session

SENATE

REPORT
No. 2041

ANGELINA MARSIGLIA

JULY 1 (legislative day, JUNE 27), 1952.—Ordered to be printed

Mr. MCCARRAN, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 3653]

The Committee on the Judiciary, to which was referred the bill (H. R. 3653) for the relief of Angelina Marsiglia, having considered the same, reports favorably thereon, with amendments, and recommends that the bill, as amended, do pass.

AMENDMENT

1. On page 1, line 3, strike all following the enacting clause and insert in lieu thereof the following:

That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, $11,288.50 to the estate of Michael R. Marsiglia. The payment of such sum shall be in full settlement of all claims of said estate against the United States as damages for the death of said Michael R. Marsiglia, who was fatally injured on December 2, 1944, when he was struck by a United States Army vehicle while said motor vehicle was proceeding on and over the public highway at the corner of West Houston and Varick Streets, Manhattan, New York City, New York: *Provided*, That no part of the amount appropriated in this Act in excess of 10 per centum thereof shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with this claim, and the same shall be unlawful, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding $1,000.

2. Amend the title so as to read:

A bill for the relief of the estate of Michael R. Marsiglia.

The purpose of the proposed amendments is to make this award payable to the estate of the decedent instead of the wife alone, inasmuch as the decedent left three children surviving him in addition to his widow.

PURPOSE

The purpose of the proposed legislation as amended is to pay the sum of $11,288.50 to the estate of Michael R. Marsiglia in full settlement of all claims against the United States on account of the death of Michael R. Marsiglia, who was fatally injured when struck by a United States Army motor vehicle while said motor vehicle was proceeding on and over the public highway at the corner of West Houston and Varick Streets, New York, N. Y.

STATEMENT

On December 2, 1944, at about 7:45 p. m., Michael R. Marsiglia was struck by a United States Army motor vehicle and fatally injured. The Army vehicle was being operated by a civilian employee of the War Department, on official business, and was proceeding south on Varick Street, New York City, approaching the intersection of Varick Street at Houston Street, at a speed estimated by the driver to be between 20 and 30 miles per hour. The maximum speed limit at the time and place in question was 20 miles per hour. The light at the intersection was green for traffic traveling on Varick Street. The accident occurred as the Army driver, nearing the intersection, struck Marsiglia, who had stepped from the curb at the northwest corner of the intersection on to the cross walk across Varick Street, against the red traffic light, and walked directly into the path of the Army vehicle. The Army driver, upon sighting Mr. Marsiglia, applied his brakes and swerved his vehicle to the left, but was unable to avoid the accident. Mr. Marsiglia died about an hour later. A chemical examination of the brain of Marsiglia, performed by the staff of the chief medical examiner of the city of New York, on the day following the accident showed "Ethyl (grain) alcohol, present, 3 plus, large amounts," which finding, the committee is informed, indicates an advanced state of drunkenness.

The Department of the Army has recommended against enactment of this legislation. This recommendation is apprently based upon the conclusion that the decedent was guilty of contributory negligence and that such contributory negligence on the part of the claimant would bar recovery in an action against the driver of the Army vehicle. The act of the decedent on which the Department of the Army relies as exhibiting contributory negligence was the act of the decedent in crossing a dimly lighted intersection against a traffic light.

Some time after this determination was made by the Department of the Army, the claimant's attorneys submitted a legal brief to the committee discussing both the factual situation at the time of the accident and the law of the State of New York concerning contributory negligence. This brief points out that the determination in the police blotter that the decedent had been crossing the intersection against the traffic light could have been based only on the statement of the driver of the Government vehicle, who could not be classified as a disinterested witness. (Apparently it is that determination which forms the basis for the assertion of the Department of the Army that the decedent was guilty of contributory negligence.) Furthermore, the brief goes on to say that the traffic light at the intersection of

Varick Street and Houston Street did not include an amber light, so that the change from the green signal to the red signal was instantaneous. Under such circumstances, the brief asserts, it is possible that the decedent had proceeded to cross the street at a time when the traffic light was in his favor. While all this is speculation, of course, the brief points out that the law of the State of New York requires a heavy burden of proof on a defendant who urges contributory negligence as a defense in a civil action instituted by the estate of a pedestrian who was killed in an accident.

Also, as stated in the brief, it is apparently the law of the State of New York that it is not contributory negligence as a matter of law for a pedestrian to cross an intersection against a traffic light. *Fitzgerald* v. *Ladabouch* (252 App. Div. 912, affd. 277 N. Y. 669).

The evidence before the committee establishes that the driver of the Government vehicle was negligent in the operation of the Government vehicle and that at the time of the accident he was acting within the scope of his employment. The question which has presented the committee with difficulty has been the issue of the contributory negligence of the decedent. The committee has heretofore approved awards where it was alleged that the claimant was guilty of contributory negligence, if it could be established to the satisfaction of the committee that recovery would have been permissible under the law of the State in which the accident occurred. In this case, the committee is satisfied that with the burden of proof which New York law places upon a defendant in an action such as this, it would have been possible for the decedent's estate to recover in an action at law in the State of New York had such an action been feasible as a practical matter. However, such an action was not practical, since the accident occurred prior to the effective date of the Federal Tort Claims Act, and the claimant's sole remedy was against the driver of the Government vehicle, who was at the time of the accident only 18 years old and "financially irresponsible." In view of these circumstances, the committee feels that this legislation should receive favorable consideration.

Attached hereto is the report of the Department of the Army submitted in connection with a similar bill introduced for the relief of the same claimant in an earlier Congress. Also attached is a memorandum of law in support of the bill submitted by the attorneys for the claimant.

DEPARTMENT OF THE ARMY,
Washington, D. C., November 5, 1947.

Hon. EARL C. MICHENER,
Chairman, Committee on the Judiciary,
House of Representatives.

DEAR MR. MICHENER: The Department of the Army is opposed to the enactment of H. R. 699, Eightieth Congress, a bill for the relief of Angelina Marsiglia. This bill would authorize and direct the Secretary of the Treasury "to pay, out of any money in the Treasury not otherwise appropriated, to Angelina Marsiglia, New York City, New York, the sum of $10,000 * * * in full settlement of all claims of the said Angelina Marsiglia against the United States on account of the death of her husband Michael R. Marsiglia, who was fatally injured on December 2, 1944, when he was struck by a United States Army motor vehicle while said motor vehicle was proceeding on and over the public highway at the corner of West Houston and Varick Streets, Manhattan, New York City, N. Y."

On December 2, 1944, at about 7:45 p. m., an Army sedan operated by a civilian employee of the War Department on official business, was proceeding south on Varick Street in New York, N. Y., approaching its intersection with West Houston

Street, at a speed stated by him as between 20 and 30 miles an hour and estimated by a policeman, who, however, did not witness the accident, at not less than 32 miles an hour. The maximum speed limit at the time and place in question was 20 miles an hour. The light at the intersection was green for traffic traveling on Varick Street. It appears that as the Army driver was nearing the intersection, Michael Marsiglia, 67 Thompson Street, New York, N. Y., stepped from the curb at the northwest corner of the intersection onto the cross walk across Varick Street against the red traffic light and walked directly into the path of the oncoming Army vehicle. The Army driver immediately applied his brakes and swerved his vehicle to the left, but he was unable to avoid the accident. The Army car struck Mr. Marsiglia, causing injuries from which he died about an hour later. A chemical examination of the brain of Mr. Marsiglia, performed by the staff of the chief medical examiner of the city of New York on December 3, 1944, showed "Ethyl (grain) alcohol, present 3 plus, large amounts."

Mr. Marsiglia was 50 years of age at the time of this death and was employed as a loader for a trucking concern at a wage fo $44 a week, exclusive of overtime. He left surviving his wife, Mrs. Angelina Marsiglia, 47 years of age, and three minor sons, ages 16, 14, and 12 years, respectively, all of which persons were wholly dependent upon him for their support.

It appears that by reason of the injury and death of Mr. Marsiglia the following expenses were incurred:

Medical and hospital expenses	$21. 00
Burial expenses	1, 067. 50
Cost of burial plot	200. 00
Total	1, 288. 50

No claim has been filed with the Department of the Army for any damages growing out of this accident.

The evidence of record fairly establishes that this accident and the resulting death of Michael Marsiglia were proximately caused by the combined negligence of the driver of the Army vehicle involved in said accident and Mr. Marsiglia. The Army driver was negligent in operating his vehicle at a pseed in excess of the limit authorized by law, and the deceased was contributorily negligent in proceeding across the street against a red traffic light. Such contributory negligence on the part of the decedent would bar him from recovery in an action against the driver of the Army vehicle. There would, therefore, appear to be no legal basis for a claim against the United States by Mrs. Angelina Marsiglia. In view of all of the facts and circumstances surrouding this accident the Department of the Army, while deeply regretting the accident and the resulting death of Mr. Marsiglia, is constrained to recommend that the bill be not favorably considered.

The Bureau of the Budget advises that there is no objection to the submission of this report.

Sincerely yours,

KENNETH C. ROYALL,
Secretary of the Army.

IN THE MATTER OF H. R. 3653, A BILL FOR THE RELIEF OF ANGELINA MARSIGLIA

A MEMORANDUM IN SUPPORT OF H. R. 3653—A BILL FOR THE RELIEF OF ANGELINA MARSIGLIA

STATEMENT

Angelina Marsiglia is the widow of one Michael R. Marsiglia, who was fatally injured when struck by a United States Army sedan operated by a civilian employee of the War Department on official business. Marsiglia was in the act of crossing, from west to east, at the intersection of West Houston and Varick Streets, in the city and State of New York, and concededly was no more than 4 or 5 feet east of the westerly curb at the north crossing when he was run down by the Army sedan which was then proceeding south on Varick Street (exhibits 1, 2, 3, and 4).

The report of the Department of the Army, dated November 5, 1947, signed by Hon. Kenneth C. Royall, Secretary of the Army, and addressed to Hon. Earl C. Michener, then chairman of the Committee on the Judiciary of the House of Representatives, contains the following statement:

"The Army driver was negligent in operating his vehicle at a speed in excess of the limit authorized by law, and the deceased was contributorily negligent in proceeding across the street against a red traffic light."

It was the opinion of the Secretary of the Army that such alleged contributory negligence on the part of the decedent would bar him from recovery in an action against the driver of the Army vehicle. The purpose of this memorandum is to demonstrate that this conclusion of the Secretary of War in relation to the contributory negligence of the deceased is not substantiated by the record facts and is not in accordance with modern New York law.

The accident occurred long after dark, at about 7:45 p. m., on December 2, 1944, when the streets were dimly illuminated because of a wartime brown-out. This special condition of dim visibility imposed upon drivers the duty of proceeding with extraordinary care and at a slow rate of speed. Consequently, the lawful speed limit at the time, for all drivers of motor vehicles, from one-half hour after sunset until one-half hour before sunrise, was 20 miles per hour. (Sec. 60 of the Police Regulations of the City of New York, in force at the time, exhibit 7.)

Of the utmost significance is the fact that the driver of this Army sedan traveled 72 feet between the time he put on his brakes and the time he struck the decedent. Standard tables (as shown in the Official Drivers Manual of the Bureau of Motor Vehicles of the State of New York, p. 35), indicate that a vehicle having four-wheel brakes, traveling at the rate of 30 miles an hour, will stop within 67 feet after application of the brakes. Thus is it plain that the Army sedan was traveling at a rate in excess of 30 miles per hour. The speed at which this vehicle was traveling was shown by the force of impact. The official report of the Motor Vehicle Bureau of the State of New York, showed: "Hood bent, radiator cracked, right headlight out."

Detective Fernen, badge 342, attached to the motor vehicle homicide squad of the police department of the city of New York, testified before the magistrate's court in the city of New York, on December 11, 1944, that after measuring the skid marks of the Army sedan, which skid marks totaled 72 feet, it was his opinion that the minimum speed at which the vehicle was traveling at the time in question was 32 miles per hour (exhibit 2, s. m. p. 9, last line of page). Thus, the Army sedan was traveling, at the least, in excess of 1½ times the permissible speed limit.

It is a reasonable and, indeed, a necessary inference of fact that if the driver of the Army sedan had kept within lawful speed limit the accident would not have occurred. It is also a necessary inference that the driver of the Army sedan not only violated the lawful speed limit, but did not exercise the care required of him under the prevailing condition of dim illumination. Moreover, there is no evidence that as he approached the intersection he gave any notice or warning of his approach. The driver told the city detective, as the latter testified at the hearing in the New York City magistrate's court, that he (the driver) "didn't know whether he sounded his horn or not" (exhibit 2, s. m. p. 7).

Thus we have here a case where the decedent was struck down at an intersection which he was lawfully crossing. He was not jaywalking; he was crossing at the intersection. We have a dimly illuminated street, we have the Army sedan approaching the intersection at a speed greatly in excess of the lawful rate, and without horn or other warning.

The sole reason which was suggested by the Secretary of the Army for denying relief here is that the decedent crossed against the traffic-control light. The contention is made in behalf of the Secretary of War that this was contributory negligence per se under the law of New York and preverts a recovery in the courts of that State.

The answer to this contention is threefold.

1. In a death action the law of New York places upon the defendant the burden of proof of the contributory negligence of the deceased.

2. It is not negligence as a matter of law, under the New York cases, for a pedestrian to cross at an intersection against the traffic lights.

3. In any event, the driver of the vehicle is required to afford the pedestrian a last clear chance of safety.

Point I. Under the law of New York it is incumbent upon the defendant to carry the burden of proving the contributory negligence of the decedent

Section 131 of the decedent estate law of the State of New York (Laws of 1920, ch. 919), provides: "On the trial of an action to recover damages for causing death the contributory negligence of the person killed shall be a defense, to be pleaded and proven by the defendant."

The meaning and effect of this statutory provision was clearly explained by the highest court of New York in a recent case, *Noseworthy, as Administratrix* v.

City of N. Y. (298 N. Y. 76 (1948)). Writing for the court of appeals, Judge Desmond said:

"The second error on which we comment was the court's refusal to instruct the jurors that: 'in a death case such as this, the plaintiff is not held to the high degree of proof required in a case where the injured person may take the stand and give his version of the happening of the accident.' We think plaintiff was entitled to such an instruction. In the earlier cases, before the burden of proof as to contributory negligence in death cases, was, in 1913, shifted by statute (decedent estate law, sec. 131) to defendants, the courts announced the rule that since the one accused of contributory negligence was not alive to speak for himself, only slight proof of his freedom from guilt would be required (see *Schafer* v. *Mayor*, 154 N. Y. 466; *McHugh* v. *Manhattan Ry. Co.*, 179 N. Y. 378, 383; *Harrison* v. *New York Central & H. R. R. R. Co.*, 195 N. Y. 86, 90). But the recent cases do not limit this liberality to the question of contributory negligence, and say that in a death case a plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence (*McBride* v. *Brady*, 234 App. Div. 882; *Herbert* v. *Smith Paper Corp.*, 243 App. Div. 260, 263; *Frate* v. *State of New York*, 245 App. Div. 442, 445). We think that is sound and right. It is based on the 'consideration' mentioned in *Griffen* v. *Manice* (166 N. Y. 188, 193–194) 'that where the management and control of the thing which has produced the injury is exclusively vested in the defendant, it is within his power to produce evidence of the actual cause that produced the accident, which the plaintiff is unable to present.' *Griffin* v. *Manice* (*supra*) goes on to say (166 N. Y. at p. 194) that it is a general rule of evidence, applicable to every sort of case, 'that where the defendant has knowledge of a fact but slight evidence is requisite to shift on him the burden of explanation.' All that applies with greatest force to a situation like that before us here, where no one except the motorman knew what took place early that morning in that deserted subway station" (pp. 80–81).

These considered pronouncements of the court of appeals show that, under the law of New York, in a death action, the plaintiff is not held to the high degree of proof required in other cases, that he is not held to a high degree of proof even of the defendant's negligence, the point upon which he has the burden of proof; and that but slight evidence in plaintiff's favor is enough to shift to defendant the burden of explanation; and that as to the plaintiff's contributory negligence, the whole burden rests upon the defendant.

In the Noseworthy case, supra, Noseworthy, plaintiff's intestate, having as the court said: "somehow gotten down from the platform, in one of defendant's subway stations, to the tracks a few feet below, was struck by a subway train" (p. 78).

The deceased Noseworthy had no apparent business to be on the subway tracks, he was not a subway worker. Nevertheless, the court held that there was: "*a jury question as to whether or not defendant's motorman was negligent in failing to see decedent until the train was so close that disaster was inevitable (citing case)*" (p. 79). [Emphasis supplied.]

The present case is far more favorable from the plaintiff's point of view than was the Noseworthy case. Here, the late Mr. Marsiglia was not down on the subway tracks, where he would have had no business to be. He was lawfully and properly crossing an intersection. And under the rule of the Noseworthy case, but slight evidence of defendant's negligence is sufficient in a death action. In view of the rule that defendant has the burden of proving the contributory negligence of the plaintiff, can anyone doubt that Marsiglia's widow would have had a recovery in the courts of New York?

Can anyone doubt that this widow would have been allowed to recover in New York, in view of the fact that when the decedent, Marsiglia, stepped off the curb the Army sedan was more than 70 feet away. It is not contributory negligence to cross in front of a vehicle more than 70 feet away. If this vehicle had been traveling at a lawful rate of speed, the decedent would have safely crossed the intersection without being struck. It was no negligence on the part of the decedent, but the driver's lack of control of this vehicle, and his excessive rate of speed, that caused the death of Marsiglia.

It is suggested that the decedent was intoxicated. However, it is clear that his alleged intoxication did not cause this accident; and even an intoxicated man is entitled to a last clear chance of safety. However, a sober man would have acted with reasonable prudence in attempting to cross when an oncoming vehicle was more than 70 feet away, at a place where the lawful speed limit was 20 miles per hour. It is not negligent for an intoxicated man to do what a sober person

could reasonably do. In sustaining a verdict for the plaintiff in a death action, the appellate division, second department, said in *Keefer, as Administratrix, etc.*, v. *Daum* (262 App. Div. 1044 (1941)):

"The evidence sustains a finding of negligence on the part of the defendant and of freedom from contributory negligence on the part of plaintiff's intestate. The latter's intoxication did not constitute contributory negligence as matter of law in the circumstances, and defendant's negligence was a proximate and the responsible cause of the accident (citing cases)."

So, here, the driver's lack of control of the vehicle, and the excessive rate of speed at which he traveled, were the proximate cause of the unfortunate death of Marsiglia.

A factual situation somewhat analogous to that in hand was presented in *Angueira, as Administratrix, etc.*, v. *Brooklyn & Queens Transit Corporation* (263 App. Div. 43 (1941)). There, the deceased was intoxicated at the time he met his death (p. 44) and was struck by a trolley car when crossing the street. The court said:

"We find that it was not contributory negligence, as a matter of law, for decedent, a pedestrian, to start to cross a street on which was located a trolley track, the first rail of which was ten feet from the curb, at a time when the nearest trolley car was 60 feet away, across an intervening street and apparently standing still, or just beginning to move. The burden of proving contributory negligence was on defendant. * * *

"On the issue of defendant's negligence the jury would likewise have the right to consider all the circumstances relating thereto, including the question of the speed of the car. As we have stated, one witness testified that the car was traveling at the rate of 25 to 30 miles an hour when it struck deceased. Such testimony, if credited by the jury, might be found to be some evidence of negligence in that it established a violation of section 14 of the Traffic Regulations of the City of New York in effect at the time, which limited the speed of all vehicles on city streets to not more than 25 miles per hour. These regulations have the force of law, and may be judicially noticed" (p. 45).

This language is apposite here. Also apposite is the following language of the Court of Appeals in New York in *Lee* v. *City Brewing Corporation* (279 N. Y. 380, 388–9 (1939)):

"Suffice it to say that from the oral evidence and from the physical situation and the surrounding facts and circumstances, there was ample basis for the jury to find that the operator of the truck approached and entered the intersection at a speed far in excess of 25 miles per hour, without warning and in a negligent and reckless manner, and without consideration of the conditions then obtaining, and that his failure to exercise the care and prudence required under the circumstances was the sole proximate cause of the accident. The court advised the jury as to the rates of speed permissible under the vehicle and traffic law and charges without exception, that if it were found that the truck was being operated at a greater speed than those specified the jury might take that into consideration and infer negligent driving on the part of the operator, having in mind the conditions which obtained at the time and place of the accident. *Although the driver of the truck had the right-of-way under the vehicle and traffic law, that gave him no authority to operate his truck carelessly and negligently and without consideration of the circumstances and conditions existing at the time* (citing case)." [Emphasis supplied.]

The above quotation is almost a summary of the factual situation in the present case. Here, too, it is plain that the operator of the Army sedan approached and entered the intersection which the deceased pedestrian was in the act of crossing, at a speed more than 1½ times in excess of the lawful limit, without consideration of the poor visibility which was the result of the brown-out and without blowing his horn or giving any warning of his approach.

The negligence of the driver of the Army sedan is plain and the Secretary of the Army has not disputed the negligence of such driver.

It has not been proved, and the testimony of the driver of this sedan did not establish, that the decedent was contributorily negligent. Crossing against the traffic lights when an oncoming vehicle, which should have been traveling at no more than 20 miles an hour, was at least 72 feet away, could not, in any view of the case, factually or legally, constitute contributory negligence. As the Court of Appeals said in the Noseworthy case, supra: "All that applies with greatest force to a situation like that before us here, where no one except the motorman knew what took place early that morning in that deserted subway station" (298 N. Y. 76, at p. 81).

Here, too, there are no witnesses to this accident, which occurred on this dark street. The only living person who saw it happen was the driver of the Army sedan. Therefore, as was held in the Noseworthy case, but slight evidence was necessary to shift to the driver the burden of explanation.

Here the driver has failed to explain how or in what respect the decedent was negligent.

It has, indeed, been plainly shown that it was the driver's failure to control his vehicle, and the excessive speed at which he traveled, that caused Marsiglia's death.

Point II. It is not negligence as a matter of law, under the New York cases, for a pedestrian to cross at an intersection against the traffic lights

In *Fitzgerald* v. *Ladabouch* (252 App. Div. 912 (1937)), affirmed by the Court of Appeals of New York, 227 N. Y. 669, the plaintiff had a recovery of $8,201.90 for injuries sustained by her when she crossed a street intersection in the city of Glens Falls against the traffic control light. The appellate division held that such recovery was proper and allowed the verdict to stand and was, as hereinabove indicated, affirmed in the highest court of the State.

Fitzgerald v. *Ladabouch, supra,* was cited with approval in the later case of *Bergman* v. *Schultz* (274 App. Div. 1001 (1948)). There the court said: "It was error for the court to charge that, if a pedestrian crosses against a traffic light, that is contributory negligence as a matter of law." (*Fitzgerald* v. *Ladabouch,* 252 App. Div. 912, affd., 277 N. Y. 669.)

In a leading New York case, *Telda* v. *Ellman* (280 N. Y. 124 (1939)), two pedestrians were hit, one of them being killed, when walking on a highway in violation of subdivision 6 of section 83 of the Vehicle and Traffic Law. This statute of the State of New York provides that pedestrians walking on a traveled part of a roadway shall keep to the left of the center line thereof. These pedestrians were walking on the right side of the center line of the road, in defiance, as it were, of this statute, when they were hit. A recovery, by the administratrix of the estate of the deceased pedestrian, and by the surviving pedestrian, was upheld both in the appellate division and in the court of appeals. The court of appeals said:

"Upon this appeal, the only question presented is whether, as matter of law, disregard of the statutory rule that pedestrians shall keep to the left of the center line of a highway constitutes contributory negligence which bars any recovery by the plaintiff" (p. 127).

This question the court answered in the negative, holding specifically that disregard of the statutory rule does not constitute contributory negligence barring recovery by the plaintiff.

The traffic situation in the crowded streets of Manhattan is quite different from that which prevails on the broad avenues of Washington or on the wide roads of Los Angeles, where vehicles are permitted and expected to move at considerably higher rates of speed than is the case in Manhattan. The wide streets of cities like Los Angeles were especially designed for fast-moving automobile traffic. On the streets and avenues in such cities pedestrians are required to wait for traffic lights. In such cities to cross against the traffic-control light is to invite disaster and may well give rise to a clear inference of contributory negligence. In some of these cities, because of these conditions, it is a traffic offense for pedestrians to cross against the light. It is not a traffic offense to do so in New York City. Moreover, where the traffic is necessarily slow moving, as in many sections of New York, it is reasonable and prudent to cross without waiting for the traffic light to change, the danger and risk of so crossing being insignificant. These considerations may well have influenced the New York courts to hold, as they have consistently done, that crossing against the traffic-control light is not contributory negligence as a matter of law.

There is no reliable evidence that the decedent crossed against a traffic control light. The assumption to that effect is unwarranted

For the sake of the argument this memorandum has compliantly gone along with the assumption of the Secretary of War that the decedent actually crossed against a traffic control light. As a matter of fact, however, there is not the slightest basis for such an assumption of fact. It may be true that at the moment of contact between the Army sedan and the decedent the traffic control light was against the decedent, although we have only the word of the driver of the Army sedan and no other testimony to substantiate such an assumption. Assuming, however, that the driver of the Army sedan was telling the truth, it does not follow from his testimony that the traffic control light was against the decedent

at the moment that he started to cross the street. In the city of New York, at the time and place in question, there was no intermediate traffic light; that is, the light changed instanter from green to red; there was no intervening yellow or amber cautionary light. Under such conditions, the light may well change while a pedestrian is in the act of crossing the street or after he has stepped off the curb. This may have been the case here. If the light changes against a pedestrian after he has stepped from the curb, he continues to have the right-of-way until he has completed the crossing, but such right-of-way is more often honored in the breach by oncoming vehicles than in the observance thereof.

It may well be the case that when this decedent stepped from the curb the light was in his favor, not against him. We can only speculate. It may even be the case that the driver of the Army sedan wzs mistaken when he testified that at the time he struck the decedent the traffic control light was in his, the driver's, favor and against the decedent. It is entirely a matter of speculation whether or not Marsiglia crossed or started to cross against the light. All of this illustrates the salutary rule firmly established by the court of appeals of New York in the Noseworthy case, supra, and indicated in earlier cases as well, that in a death action only a slight degree of proof is necessary to establish the negligence of the defendant and that the trier of the facts is warranted in drawing every possible inference favorable to the decedent, both in relation to the question of the defendant's negligence and the decedent's freedom from contributory negligence. When the factual situation in the case in hand is carefully analyzed, it becomes at once apparent that we are only speculating when we say that this decedent crossed, or started to cross, against a traffic control light. The law is clear that we may not speculate to the disadvantage of and in detriment of the right of the personal representative, or widow, of a deceased person who is not here to tell his own story for himself. This is doubly true where all of the evidence in the case comes from the lips of an interested witness, from the culpable driver of the vehicle which struck down the decedent. Not by such evidence and by such speculation and surmise are these human rights and interests to be dissipated; modern law in New York and in many other jurisdictions does not sanction this.

Point III. The driver of the vehicle was required to afford the deceased pedestrian a last clear chance of safety

The last clear chance doctrine was clearly enunciated by the highest court of New York, in *Chadwick, as Administrator*, v. *City of New York* (301 N. Y. 176, 181 (1950)), as follows:

"To a large degree the last clear chance doctrine necessarily arises out of circumstances subject to conflicting inferences and it may not be categorically stated that its applicability is limited to situations where a defendant has precise knowledge of both the exact nature of the danger and of the particular individual threatened so long as there is proof to support an inference that someone is in peril.

"* * * * * * *

"Professed ignorance (by the defendant) of the danger is not alone as a matter of law, a defense if the circumstantial evidence might show that the defendant in fact had the requisite knowledge upon which a reasonably prudent man would act (citing cases)." [Matter in parentheses supplied.]

Here the circumstantial evidence clearly shows that the driver of the Army sedan had the requisite knowledge which should have enabled him, if he had acted as a reasonably prudent man should have acted, to afford the deceased a last clear chance of safety. The undisputed facts show that Varick Street measures 59 feet from curb to curb; that at the time of the accident no other vehicles were proceeding over this highway; that decedent, when struck, was no more than 4 or 5 feet from the westerly curb from which he had started to cross the street. The uncontroverted testimony shows that there were skid marks for a distance of 72 feet. It is clear from the length of the skid marks that the driver must have seen the decedent when he (the driver) was at least 75 or 80 feet from the point of contact (the driver applied his brakes when the vehicle was distant 72 feet from the decedent and it is a fair inference he traveled about 3 to 8 feet between the time he saw the decedent and was able to apply his brakes). The conclusion is inescapable that if the driver had had his vehicle under proper control he could have stopped in time to avoid the accident. The conclusion is also inescapable that if the driver had afforded the decedent a reasonable chance of safety or even the last clear chance of safety, he could have swerved his vehicle to the left in this wide street upon which no other vehicle was proceeding at the time, and that by such an operation he could have avoided the accident.

Whatever view of this case be taken, in whatever light the facts be considered, the conclusion emerges that the negligence of the driver was the sole cause of this accident. And this is true even if the case be tested by the strictest common-law standards rather than by the extremely liberal New York rule applicable to death actions, under which rule but slight proof of defendant's negligence is sufficient to establish a cause of action against the defendant, and the defendant has the burden of establishing the decedent's contributory negligence.

THE EQUITIES

The decedent was 50 years of age at the time of his death. He was a citizen of the United States, having been born in Hazelton, Pa. (exhibit 4). He was a veteran of World War I, who served overseas and was honorably discharged from the United States Army on May 9, 1919, with an exemplary conduct record (exhibit 5). He was gainfully employed at the time of his death as a loader, working for Associate Transport, Inc., a trucking firm in the city of New York, at a salary of $44 per week, plus overtime compensation.

He left surviving him a wife, the claimant herein, who at the time of his death was 47 years of age, and three male infant children of the ages of 16, 14, and 12, respectively, all of whom were totally dependent upon the decedent for their support and maintenance (report of the Secretary of the Army). The decedent's widow is a diabetic, necessarily under the constant care of a physician. The oldest son has been hospitalized from time to time over many years because of a rheumatic heart condition.

The funeral expenses and burial services amounted to $1,067.57 (exhibit 6). The widow purchased a plot for the decedent at a cost of $200. The medical and hospital bill was $21.

The decedent left no property or assets of any kind except an insurance policy in the sum of $500 which had a provision for double indemnity in the event of accidental death.

As indicated by the police blotter report, the driver of the Army vehicle was 18 years of age, and investigation showed that he was financially irresponsible, so that it was futile to sue him.

It may be remarked, parenthetically, that the extreme youth of the driver of the Army sedan explains in a way his recklessness.

CONCLUSION

It is respectfully submitted that the widow, Angelina Marsiglia, be granted the relief represented by H. R. 3653, and that this bill be approved.

Respectfully submitted.

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